IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-

DELTA AIR LINES, INC.,

Petitioner,

vs.

ROSEMARY AUGUST,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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vs.

ROSEMARY AUGUST,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, Delta Air Lines, Inc. ("Delta"), prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in these proceedings on July 6, 1979.

OPINIONS BELOW.

The Order of the Court of Appeals denying Delta's petition for rehearing and suggestion for hearing *en banc* is set forth in Appendix A to this Petition. The opinion of the Court of Appeals on the Rule 68 matter, reported as *August* v. *Delta Air Lines, Inc.*, 600 F. 2d 699 (7th Cir. 1979), is set forth in Appendix B to this Petition.

The unreported opinion of the United States District Court for the Northern District of Illinois on the Rule 68 matter is set forth in Appendix C to this Petition.

The separate unpublished opinion of the Court of Appeals on the merits is set forth in Appendix D to this Petition. The unreported opinion of the United States District Court for the Northern District of Illinois on the merits is set forth in Appendix E to this Petition.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on July 6, 1979. Delta's timely petition for rehearing and suggestion for hearing *en banc* was denied by Order of the Court of Appeals entered on August 28, 1979. This Petition is filed within 90 days of said Order. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

Rule 68 of the Federal Rules of Civil Procedure provides that the offeree who rejects an offer of judgment and does not receive a more favorable judgment "must pay" the costs incurred after the making of the offer. Delta made such an offer to a Title VII plaintiff whose complaint was ultimately dismissed. The court of appeals denied costs to Delta, holding that "a liberal, not a technical, reading of Rule 68 is justified, at least in a Title VII case." (600 F.2d at 702, A7). The questions thus presented are:

1. Whether the court of appeals erred in nullifying the clear and unambiguous mandatory imposition of costs under Rule 68?

2. Whether the court of appeals exceeded its authority by rewriting Rule 68?

Rule 54(d) of the Federal Rules of Civil Procedure provides that costs shall be allowed as of course to the prevailing party unless the court otherwise directs. The question thus raised is:

3. Whether the court of appeals abused its discretion by denying costs to the prevailing defendant under either its liberal reading of Rule 68 or the unchallenged reading of Rule 54(d)?

FEDERAL RULES INVOLVED.

Rule 54(d) of the Federal Rules of Civil Procedure for the United States District Courts provides in relevant part:

> "Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs. . . ."

Rule 68 of the Federal Rules of Civil Procedure for the United States District Courts provides:

> "At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

STATEMENT OF THE CASE.

In January 1977 plaintiff sued Delta alleging that her termination from employment was discriminatorily motivated, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. §§ 2000e *et seq.* ("Title VII") and further alleging that Delta had defamed plaintiff. Delta denied such allegations but, nevertheless, in May, 1977 made an Offer of Judgment ("Offer") pursuant to Rule 68 of the Federal Rules of Civil Procedure ("Federal Rules") in the amount of $450 (App. F, pp. A33-34). Plaintiff failed to accept the Offer, and the cause was heard by District Court Judge Julius J. Hoffman between September 21, 1977 and October 31, 1977. The plaintiff admitted in a deposition that she knew of no facts to support her claim of defamation and Delta's motion for summary judgment was granted without opposition by plaintiff. Judgment on the Title VII claim was, after trial, entered for Delta. (App. E, pp. A19-32.) Although indicating that "the court has no difficulty in reaching its decision" (A24), the district court, without explication, ordered each party to bear its own costs of litigation. (A32.)

Thereafter, Delta brought to the court's attention the prior Offer and moved that plaintiff be ordered to pay all costs incurred after the Offer had been made. The District Court denied the motion on the basis that the Offer was not "arguably reasonable". (App. C, A11.)

Appeals were filed by both parties; plaintiff appealed on the merits, Delta appealed on the issue of the denial of costs. The court of appeals affirmed the judgment for Delta on the merits, commenting that plaintiff's evidence of discrimination was "superficial, incomplete, inadequate or otherwise defective." (App. D, A16.)

With respect to the Rule 68 matter, although stating that "the issue is not free from doubt" and "[i]n spite of the force of [Delta's] arguments" (600 F. 2d at 701, A5-6) the court of appeals held that in the context of a Title VII case a trial judge may exercise his discretion and refuse to award costs to the offeror defendant who prevails. (600 F. 2d at 702, App. B, pp. A2-7.) The court of appeals affirmed the trial court's order that each party bear its own costs.

Delta's timely Petition for Rehearing and Suggestion for Hearing En Banc was denied by the court of appeals on August 28, 1979. (App. A, p. A1.)

REASONS FOR GRANTING THE WRIT.

In a narrow sense, the propriety of the Seventh Circuit's extirpation of Rule 68 in the context of a Title VII case is at issue. In a broader sense, the efficacy and sanctity of a uniform system of rules governing the operation of our federal district courts is at issue.

On the surface, this case involves the proper interpretation and application of the cost-shifting provisions of Rule 68. The court of appeals, despite the mandatory, imperative language of the rule, held that policy considerations constrained it from following the rule as written, in the context of a Title VII case. Although aware that it was thus essentially duplicating the provisions of Rule 54(d), the court of appeals nevertheless subjected Rule 68's operation to trial court discretion. That decision alone, ignoring, as it does, the legislative history of the rule, tenents of statutory construction, and federal and state case law precedent, compels this Court's review.

The mischief of the court of appeals decision, however, cuts a deeper swath. By rewriting and thereby effectively nullifying the clear and unambiguous provisions of a Federal Rule, the court of appeals has usurped the power expressly conferred by Congress upon this Court, that of establishing general rules governing civil procedure in the federal district courts.

It might be urged that the instant case, involving "merely" an award of costs, is not of such magnitude as to require this Court's intercession. Delta submits, however, that the unbridled evisceration of the Federal Rules is more than a harmless transgression. As Justice Holmes trenchantly stated: "My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by . . . yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law." H. J. LASKI, COMMUNIST LEGAL PAPERS, 269 (1920).

The court of appeals in the instant case, by rewriting Rule 68 to fit its view of temporal needs, has perniciously torn at the fabric of our interwoven federal rules of procedure and thereby encroached upon the province of this Court and the Congress. Accordingly, because substantial questions affecting the proper interpretation and uniform application of the Federal Rules are involved, this Court should grant this petition for certiorari.

I

By the Imposition of Trial Court Discretion in Awarding Costs Pursuant to Rule 68 Offers, the Court of Appeals Has Emasculated Rule 68.

Rule 68 provides a mechanism by which a defendant may, at any time more than ten days before trial, offer to have judgment taken against it for a specified amount, together with costs then accrued. If the offer is not accepted and the judgment finally obtained by the offeree is not more favorable than the offer, Rule 68 directs that "the offeree *MUST* pay the costs incurred after the making of the offer." (Emphasis added.)

There is no dispute that all of the technical requirements prescribed in Rule 68 have been met in the instant case. Delta made a proper offer more than ten days before trial. (App. F, A 33-34.) Plaintiff did not obtain a judgment more favorable

than the rejected offer. Nevertheless, both the trial court and appellate court refused to award Delta its costs. Contrary to the unambiguous language of the Rule, and admittedly at odds with prior court decisions, the court of appeals adopted an amorphous standard by which offers under Rule 68 are to be viewed.[1] In so doing, the court of appeals has emasculated Rule 68.

A. Rule 68 Is Unambiguous and Mandatory.

The device of an Offer of Judgment was entirely new to the federal courts when it was promulgated and adopted in 1938 as Rule 68 of the then new Federal Rules of Civil Procedure. *See* Dobie, *The Federal Rules of Civil Procedure*, 25 VA. L. REV. 261, 303 (1939). Offers of Judgment were well known and used in various state courts prior to 1938. Accordingly, the Advisory Committee Notes concomitant with Rule 68 in its initial introduction into the federal system contain no explication of the rule, but merely cite the state statutes of Minnesota, Montana and New York.[2] *See* 12 WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE § 3001 (Rev. ed. 1973).

The Rule was amended in 1946 (eff. March 19, 1948). Of particular significance is the fact that the language requiring an unsuccessful offeree to pay costs was changed from "*shall* pay costs" to the present language of "*must* pay costs." (App. G,

1 The court of appeals stated standard is:

"In a Title VII case the trial judge may exercise his discretion and allow costs under Rule 68 when, viewed as of the time of the offer along with consideration of the final outcome of the case, the offer can be seen to have been made in good faith and to have had some reasonable relationship in amount to the issues, litigation risks, and expenses anticipated and involved in the case." (600 F. 2d at 702, A7)

2 A contemporaneous commentary on the newly enacted Rules stated that the provision directing the offeree to pay costs

"relieves the offering defendant of the burden of future costs, thereby constituting an inducement in the making of such offer." Dobie, *The Federal Rules of Civil Procedure*, *supra* at 304, n. 195.

A35). The Advisory Committee Notes to the 1948 amendments do not specifically discuss this change from "shall" to "must". However, in the Report of the Advisory Committee on the Proposed Amendments to the Rules of Civil Procedure (reproduced in 5 F. R. D. 433 (1946)) it is stated with respect to Rule 68 that "[defendant's] first and only offer will operate to save him the costs from the time of the offer if the plaintiff ultimately obtains a judgment less than the sum offered." 5 F. R. D. at 483. Further, a First Draft of the Advisory Committee, (submitted by Walter P. Armstrong as "Proposed Amendments To Federal Rules For Civil Procedures" and reproduced in 4 F. R. D. 124 (1946)) indicates that Rule 68 was changed to "remove ambiguities" and stated that the amended provision would provide that "no costs shall be recoverable by the offeree which were incurred after the making of an offer equal to or greater than the judgment finally obtained by the offeree, and that he should pay costs from the time of such offer." 4 F. R. D at 126. Additionally, in the final Recommendations of the Advisory Committee (submitted by Walter P. Armstrong and reproduced at 5 F. R. D. 339 (1946)), the changes in Rule 68 are discussed in the section titled "Ambiguities Resolved and Unresolved," wherein the sentence changing "shall" to "must" is quoted. 5 F. R. D. at 350. While the comments and intentions of the Advisory Committee are not binding, they are entitled to considerable weight in interpreting the Federal Rules. *See Mississippi Publishing Corp. v. Murphree*, 326 U. S. 438, 444 (1946). The Committee's intentions with respect to the operation of Rule 68 are clear; a discretionary operation was neither envisioned nor drafted.

1. "Must" Is Imperative.

The federal courts have had little occasion to decide what standards of statutory construction govern the use of the word "must". Ostensibly that is due to the infrequency with which

it is used.[3] In no case has "must" been interpreted as being discretionary. In *Berg v. Merchant*, 15 F. 2d 990 (6th Cir. 1926), *cert. den.* 274 U. S. 738 (1927) the Sixth Circuit interpreted the word "must" in the context of a wills statute and stated:

"[T]he word 'must' is so imperative in its meaning that no

3. Delta's scrutiny of the Federal Rules of Civil Procedure, for example, reveals that "must" is used but three times in addition to Rule 68:

Rule 14(a)

Otherwise he *must* obtain leave on motion to all parties. . . .

Rule 30(a)

Leave of court, granted with or without notice, *must* be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days. . . .

Rule 56(e)

When a motion for summary judgment is made and supported . . . an adverse party . . . *must* set forth specific facts showing that there is a genuine issue for trial.

The cases construing the above-referenced provisions have applied them in a mandatory, non-discretionary manner. *See generally, Rule 14(a): State Mutual Life Assurance Company v. Arthur Andersen & Co.*, 65 F. R. D. 518, 521 (S. D. N. Y. 1975); *Meilinger v. Metropolitan Edison Company*, 34 F. R. D. 143, 145 (E. D. Pa. 1963); 6 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE, § 1454 (Rev. ed. 1973).

Rule 30(a): Brause v. Travelers Fire Insurance Co., 19 F. R. D. 231, 234 (S. D. N. Y. 1956); *Park & Tilford Distillers Corp. v. Distillers Co.*, 19 F. R. D. 169, 171 (S. D. N. Y. 1956); 8 WRIGHT & MILLER, *supra* at § 2104.

Rule 56(e): Adickes v. S. H. Kress & Co., 398 U. S. 144, 160 (1970); *Macklin v. Butler*, 553 F. 2d 525, 528 (7th Cir. 1977); *Felix v. Young*, 536 F. 2d 1126, 1135 (6th Cir. 1976); *Turoff v. May Co.*, 531 F. 2d 1357, 1362 (6th Cir. 1976); *Modern Home Institute, Inc. v. Hartford Accident & Indemnity Co.*, 513 F. 2d 102, 109 (2d Cir. 1975); *Stevens v. Barnard*, 512 F. 2d 876, 878 (10th Cir. 1975); *Brown v. Ford Motor Co.*, 494 F. 2d 418, 420 (10th Cir. 1974); *Pace v. Southern Express Co.*, 409 F. 2d 331, 334 (7th Cir. 1969); *Town House, Inc. v. Paulino*, 381 F. 2d 811, 814 (9th Cir. 1967); *Liberty Leasing Co. v. Hillsum Sales Corp.*, 380 F. 2d 1013, 1015 (5th Cir. 1967); *Foy v. Norfolk & Western Railway Co.*, 377 F. 2d 243, 246 (4th Cir. 1967); *Fowler v. Southern Bell Telephone & Telegraph Co.*, 343 F. 2d 150, 154 (5th Cir. 1965).

case has been called to our attention where that word has been read 'may' ". 15 F. 2d at 991.

Moreover, the word "may" is used three times in Rule 68. It is a fundamental principle of statutory construction that "[w]here both mandatory and directory verbs are used in the same statute, . . . it is a fair inference that the legislature realized the difference in meaning, and intended that the verbs used should carry with them their ordinary meaning." 2A SUTHERLAND STATUTORY CONSTRUCTION § 57.11 (4th ed. 1973).

Finally, this Court has recognized that "the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms." *Caminetti* v. *United States*, 242 U. S. 470, 485 (1917). This Court has previously admonished appellate courts to refrain from the sort of judicial legislation here involved. In *Schlagenhauf* v. *Holder*, 379 U. S. 104 (1964), Justice Goldberg stated for the Court:

> "The Federal Rules of Civil Procedure should be liberally construed, but they should not be expanded by disregarding plainly expressed limitations." 379 U. S. at 121.

Where courts of appeals have chosen to ignore plain language and clear meaning, this Court has interceded. *See, e.g., Agosto* v. *Immigration & Naturalization Service*, 436 U. S. 748, 754-55 (1978).

The language of Rule 68 is clear and unambiguous. It is cast in mandatory, non-discretionary language and should be so interpreted. To do otherwise is to ignore the imperative "must", thereby eviscerating the Rule.

2. Progenitor State Laws Compel an Automatic Operation of Rule 68.

As previously noted, the original adoption of Rule 68 into the federal rules was based upon similar state court procedures. Although the Advisory Committee Notes reference only the

states of Minnesota, Montana and New York, several other states had established procedures for offers of judgment prior to 1938.[4]

A review of state court decisions rendered pursuant to the respective state procedures for offers of judgment, prior to the enactment of Rule 68, clearly reveals that a mandatory, non-discretionary imposition of costs under said procedures was upheld.[5]

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4. *See, e.g.* California—Cal. Civ. Proc. Code § 997 (West Supp. 1978); Colorado—*Yeager* v. *Campion*, 70 Colo. 183, 197 P. 898 (1921); Connecticut—*Wordin* v. *Bemis*, 33 Conn. 216 (1866); Indiana—*Prather* v. *Pritchard*, 26 Ind. 65 (1866); Kansas—*West* v. *Springfield Fire & Marine Ins. Co.*, 104 Kan. 157, 185 P. 12 (1919); Nebraska—*Wachsmuth* v. *Orient Ins. Co.*, 49 Neb. 590, 68 N. W. 935 (1896); Nevada—*Herring-Hall-Marvin Safe Co.* v. *Balliet*, 44 Nev. 94, 190 P. 76 (1920); Oregon—*Hammond* v. *Northern Pac. R. Co.*, 23 Or. 157, 31 P. 299 (1892); South Dakota—*Sioux Falls Adjustment Co.* v. *Penn Soo Oil Co.*, 53 S. D. 77, 220 N. W. 146 (1928); Wisconsin—*Newton* v. *Allis*, 16 Wis. 210 (1862).

5. For example, in *Ranney* v. *Russel*, 3 Duer 689 (Super. Ct. N. Y. 1854) the New York court interpreted section 385 of the New York Code, predecessor to the statute noted in the Advisory Committee Notes to Rule 68, and stated, in part: "If a defendant, . . . wishes to make an offer, which a plaintiff must accept at the peril of paying the subsequent costs, unless he recovers a more favorable judgment than the one offered. . . ." *Id.* at 690. In *Margulis* v. *Solomon & Berck*, 223 A. D. 634, 229 N. Y. S. 157 (Super Ct. N. Y. 1928) the court stated: "[I]f an offer properly made is not accepted, penalty is provided in the matter of costs after an offer has been tendered and refused, dependent on the final result." 229 N. Y. S. at 158.

In *Wachsmuth* v. *Orient Ins. Co.*, *supra*, the Nebraska Supreme Court held: "It is plainly the purpose of the statute to require in such case the plaintiff to bear his own costs, and also to bear the costs of defendant accruing after the offer." 68 N. W. at 937.

In *Herring-Hall-Marvin Safe Co.* v. *Balliet*, *supra*, the Nevada Supreme Court interpreted its statute and held: "[I]f the plaintiff fail to obtain a more favorable judgment, he shall not recover costs, but shall pay the defendant's costs from the time of the offer." 190 P. at 77.

In *Sioux Falls Adjustment Co.* v. *Penn Soo Oil Co.*, *supra*, the South Dakota Supreme Court stated: "As this [plaintiff's judgment] was less than the amount stated in the offer of judgment, defendant

(Footnote continued on next page.)

The conclusion is inescapable that if the drafters of original Rule 68 intended it to operate in the federal courts as it had in the various states, an automatic, non-discretionary operation was mandated.

3. Post Enactment Interpretation Compels an Automatic Operation of Rule 68.

While there have not been an abundance of cases decided in which the issue of mandatory versus discretionary application of Rule 68 has been an issue, the few available decisions support the mandatory approach.

Directly on point and at odds with the decisions below in the instant case, is the recent decision of *Dual* v. *Cleland*, 79 F. R. D. 696 (D. D. C. 1978). *Dual* involved a Title VII case in which the trial court ruled in favor of defendant and dismissed plaintiff's claim. As part of his dismissal order, Judge Richey ordered that each party bear its own costs. Thereafter, defendant (the Veteran's Administration, represented by the United States Attorney's office in Washington) brought to the court's attention the fact that a Rule 68 offer had been made. After contrasting Rule 54(d) with Rule 68, Judge Richey stated:

> "Rule 68 automatically charges the plaintiff with the defendant's costs incurred after an offer of judgment when the requirements of the rule are satisfied . . . The plain language of the rule eliminates the Court's discretion." 79 F. R. D. at 697.

In support of his conclusion, Judge Richey cited the only

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is entitled to its taxable costs in this court and in the trial court." 220 N. W. at 147.

Finally, in *Hammond* v. *Northern Pacific R. Co. supra*, the Oregon Supreme Court interpreted its offer of judgment provision (which stated that a plaintiff who failed to recover a more favorable judgment shall not recover costs from the time of the offer) to provide that: "[U]nless the plaintiff accept [the offer], or recover a more favorable judgment, the defendant is entitled to costs accruing subsequent to such offer." 31 P. at 301.

other federal decision directly on point, *Mr. Hanger, Inc.* v. *Cut Rate Plastic Hangers, Inc.*, 63 F. R. D. 607 (E. D. N. Y. 1974). 79 F. R. D. at 697.

In *Mr. Hanger*, a patent infringement suit, defendant had made a twenty-five dollar ($25.00) offer pursuant to Rule 68 before trial. After trial, the court ruled for defendant, concluding that plaintiff's patent was invalid. However, under the discretion permitted by Rule 54(d), costs were not awarded to defendant. Thereafter defendant brought to the court's attention its prior Rule 68 offer and requested all costs incurred after the making of the offer. Plaintiff argued that the awarding of costs is always a matter of the court's discretion, even in the presence of a Rule 68 offer. Judge Re held that:

> "Although there is no case directly in point, the express language of the rule . . . leave[s] no doubt that costs must be awarded once a proper offer of judgment has been made. It cannot be questioned that the rule itself is couched in mandatory terms. . . ." 63 F. R. D. at 610.[6]

Likewise, state courts interpreting identical or similar provisions as Rule 68, after its amendment in 1948, have had no difficulty finding an automatic, mandatory intendment to the

6. All other federal cases interpreting Rule 68, while not directly addressing the issues raised herein, have implicitly accepted the automatic, non-discretionary operation of Rule 68. *See, e.g., Truth Seeker Co., Inc.* v. *Durning*, 147 F. 2d 54, 56 (2d Cir. 1945); *Staffend* v. *Lake Central Airlines, Inc.*, 47 F. R. D. 218, 219-20 (N. D. Ohio 1969); *Maguire* v. *Federal Crop Insurance Corp.*, 9 F. R. D. 240, 242 (W. D. La. 1949), *rev'd in part on other grds.* 181 F. 2d 320 (5th Cir. 1950); *Nabors* v. *Texas Co.*, 32 F. Supp. 91, 92 (W. D. La. 1940); *see also* 12 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE, § 3005 (Rev. ed. 1973). Further, in federal cases which have mentioned Rule 68 either in comparative contexts or without any explication of its operation, no indication is given therein of a discretionary application of said rule. *See, e.g., Mason* v. *Belieu*, 543 F. 2d 215 (D. C. Cir.) *cert. denied* 429 U. S. 852 (1976); *Thomas* v. *Trans World Airlines, Inc.*, 457 F. 2d 1053 (3d Cir. 1972); *Scheriff* v. *Beck*, 452 F. Supp. 1254 (D. Colo. 1978); *Read* v. *Baker*, 438 F. Supp. 737 (D. Del. 1977), *aff'd.* 577 F. 2d 728 (3d Cir.), *cert. denied*, 439 U. S. 869 (1978); *Perkins* v. *New Orleans Athletics Club*, 429 F. Supp. 661 (E. D. La. 1976); *Honea* v. *Crescent Ford Truck Sales*, 394 F. Supp. 201 (E. D. La. 1975).

operation of their respective rules. Thus, the following decisions support the mandatory imposition of costs as part of the operation of offers of judgment. *Miklautsch* v. *Dominick*, 452 P. 2d 438 (Alaska 1969) (Interpreting a provision identical to federal Rule 68, the Alaska Supreme Court stated: "All that is required to bring into play 'the offeree must pay the costs . . .' portion of Civil Rule 68 is a recovery which falls short of the offer of judgment . . . [A]ny other interpretation would be contrary to the clear meaning of the text of the rule, as well as in derogation of the rule's rationale." *Id.* at 440); *Pomeroy* v. *Zion*, 19 Cal. App. 3d 473, 96 Cal. Rptr. 822 (Cal. App. 1971) (Contrasting § 997 of the Code of Civil Procedure, which was worded similarly to Rule 68, with CCP § 998 which was broader in scope and couched in the permissive "may," the court stated: "Under CCP 997 costs from the date of offer are recovered as a matter of right, whereas under new CCP 998 costs . . . are recovered at the discretion of the court." *Id.* at 476 ff., 96 Cal. Rptr. at 824); *Sanservchan* v. *McGrath*, 320 So. 2d 476 (Fla. App. 1975) (Plaintiff argued that the terminology 'must pay the costs' of Florida Rule 1.442, RCP, should be interpreted as discretionary and not mandatory. Rejecting such argument, the court stated: "These arguments are not well taken . . . From a reading of federal cases [citing *Nabors* v. *Texas Co.*, *supra*], construing Rule 68 of the Federal Rules of Civil Procedure, which is identical to Rule 1.442, RCP, and from what we determine to be the intent of the Florida rule, we hold that the express language leaves no doubt that reasonable costs be awarded to the defendant . . . The rule itself, is couched in mandatory terms . . ." *Id.* at 478.) *Cowles* v. *Hoffman*, 19 Wis. 2d 236, 120 N.W. 2d 137 (1963) (The Wisconsin Supreme Court, citing an earlier case of *Nolop* v. *Spettel*, 267 Wis. 245, 64 N.W. 2d 859 (1954), stated: "[D]efendants might have offered judgment under sec. 269.02, Stats., in which case if the plaintiffs had rejected the offer and the plaintiffs failed to recover a more favorable judgment the defendants would have been entitled to full costs." 19 Wis. 2d at 238, 120 N.W. 2d at 138); *see also Krawiec* v. *Kraft*, 163 Conn. 445, 311 A. 2d 82 (1972); *Crudup* v. *Marrero*, 57 N.J. 353, 273 A. 2d 16 (1971); *Benda* v. *Fana*, 10 Ohio St. 2d 259, 227 N.E. 2d 197 (1967).

It is abundantly clear that the court of appeals herein ignored precedent and persuasive reasoning from all available sources when it chose to eliminate the "technical" requirement of the rule in the instant case. This Court should therefore review and redress the lower court's emasculation of Rule 68.

B. Rule 54(d) Has Been Effectively Duplicated by the Court of Appeals Redrafting of Rule 68.

The present "American" position regarding the litigation burdens of costs is the product of a gradual seven hundred year evolution. At the outset, the common law denied costs to both parties. BLACKSTONE'S COMMENTARIES 398-400 (Lewis ed. 1897). Although the losing party was liable to the Crown for at least a nominal sum, neither unsuccessful plaintiff nor defendant was taxed for costs payable to the prevailing opponent. Goodhart, *Costs*, 38 YALE L. J. 849, 852 (1929). In the early thirteenth century, the courts began to award to prevailing plaintiffs a reasonable sum as costs of prosecuting their rightful claims. Note, 49 YALE L. J. 699, 700 (1940). This practice was not a firm rule, however, until the Statute of Gloucester (6 Edw. I, c. 1 (1275)), wherein costs to the prevailing plaintiff were made mandatory. Over the next several hundred years, a series of enactments provided for costs to successful defendants in a variety of enumerated actions culminating in a 1607 statute (4 James I, c. 3) which gave costs to the prevailing defendants in all those actions where prevailing plaintiffs would be entitled to costs.

In the Supreme Court of Judicature Act of 1875, (38 and 39 Vict. c. 77 (1875)), Order 55 of the Rules of Court attached

so the Act provided that "the costs of an incident to all proceedings in the High Court shall be in the discretion of the Court." This short order was expanded in 1883 when the Rules of Court were substantially rewritten.

The above history of the imposition of costs in England pertains only to the practice at law. In equity, the giving of costs was entirely discretionary. *Jones* v. *Coxeter*, 2 Atk. 400 (1742). Therefore the merger of law and equity in the Judicature Act of 1875 and the attendant Rules of Court made no basic change in equity costs.

Prior to the promulgation of the Federal Rules of Civil Procedure, the American position regarding costs was that the prevailing party in an action at law was entitled to costs as of right. Justice Brandeis stated the principle:

> "While in equity proceedings the allowance and imposition of costs is, unless controlled by statute or rule of court, a matter of discretion, it has been uniformly held that in actions at law the prevailing party is entitled to costs as of right, except in those few cases where by express statutory provision or by established principles costs are denied."

In Re Peterson, 253 U. S. 300, 317-18 (1920).

The decision which most sharply illustrates the binding power of the rule giving costs to the winner in litigation was *United States* v. *Schurz*, 102 U. S. (12 Otto) 407 (1881). In that case judgment was obtained against Mr. Schurz for the manner in which he had discharged certain official duties as Secretary of the Interior. No intentional wrong was charged against him, and the lower court felt that it would be wrong to require him to pay costs out of his own pocket. An order was therefore made that each party should pay his own costs. The Supreme Court sympathized with the defendant but felt compelled to reverse the order:

> "[A] careful examination of the authorities leaves us no option but to follow the rule that the prevailing party shall

> recover of the unsuccessful one the legal costs which he has expended in obtaining his rights." 102 U. S. at 408.

As was stated above, in England equitable costs were always discretionary. That same status existed in American equity jurisdictions as well:

> "In actions at law costs follow the result as of course, but in equity costs not otherwise governed by statute are given or withheld in the sound discretion of the court according to the facts and circumstances of the case."

Kansas City Southern Railway Co. v. *Guardian Trust Co.*, 281 U. S. 1, 9 (1929).

Very much as law and equity merged in England in 1875, the two bars joined in this country in the Federal Rules of Civil Procedure with the result that in federal cases the trial court generally has broad discretion as to costs at law as well as in equity. 6 MOORE'S FEDERAL PRACTICE § 54.70[3] (2d ed. 1976).

While the use of discretion as a judicial safety valve to avoid abuses of the general rule is certainly desirable, objective standards would seem to be necessary to avoid abuses of the discretion. In England the Taxing Master under court rules may allow only those costs necessary for defending the rights of any party. Greenberger, *The Cost of Justice, An American Problem, An English Solution*, 9 VILL. L. REV. 400, 402 n. 9 (1964). In the United States, restraints on the court's discretion to levy costs have developed gradually through case law so that the discretion, in most circuits, is not unbridled.

Indeed, most circuits impose a requirement that the trial court articulate justification for not allowing costs to the prevailing party or there will be a finding of abuse of discretion.[7]

7. *See generally*, *Shima* v. *Brown*, 140 F. 2d 337 (D. C. Cir.) *cert. denied*, 318 U. S. 787 (1943); *Compania Pelineon de Naregacion* v. *Texas Petroleum Co.*, 540 F. 2d 53 (2d Cir. 1976) *cert.*

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By its untoward construction of Rule 68, therein granting broad discretion to the trial judge, the court of appeals in the instant case has not only rendered Rule 68 essentially duplicative of Rule 54(d) in a Title VII context, but has ignored the considerable historical evolution of rules with respect to costs. Rule 54(d) presumes, absent special delineated circumstances, that the prevailing party will be awarded costs. (*See* cases cited note 7, *supra*). Rule 68, on the other hand, rests not on distinctions of prevailing litigants, but on judgments ultimately rendered. It provides insurance against the obdurate plaintiff, and contains its own set of internal incentives. It offers protection to the defendant who is willing, before trial, to settle a case by giving plaintiff *more* than the court eventually decides plaintiff is due.

It is axiomatic that rules of the courts are not to be construed as individually isolated rules, but rather should be interpreted as a harmonious whole. *Nasser* v. *Isthmian Lines*, 331 F. 2d 124, 127 (2d Cir. 1964). Only a mandatory construction of Rule 68 ensures that it has significance independent of Rule 54(d), and that the two rules are allowed to achieve historical intendments.

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denied, 429 U. S. 1041 (1977); *ADM Corp.* v. *Speedmastic Packaging Corp.*, 525 F. 2d 662 (3d Cir. 1975); *Constantino* v. *American S. T. Achilles*, 580 F. 2d 121 (4th Cir. 1978); *Walters* v. *Roadway Express*, 557 F. 2d 522 (5th Cir. 1977); *Lichter Foundation, Inc.* v. *Welch*, 269 F. 2d 142 (6th Cir. 1959); *Popeil Brothers, Inc.* v. *Schick Electric, Inc.*, 516 F. 2d 772 (7th Cir. 1975); *Chicago Sugar Co.* v. *American Sugar Refining Co.*, 176 F. 2d 1 (7th Cir. 1949), *cert. denied*, 338 U. S. 948 (1950); *Subscription Television, Inc.* v. *Southern California Theatre Owner's Assoc.*, 576 F. 2d 230 (9th Cir. 1978).

II.

By Its Admitted Rewriting of Rule 68, the Court of Appeals Exceeded Its Authority.

The court of appeals held that it did "not propose to permit a technical interpretation of a procedural rule to chill" Title VII litigation. (600 F. 2d at 701, A6). By inferentially interpreting the word "must" to mean "may", if so required by the court, the court of appeals has rewritten Rule 68.

A. The Supreme Court Has Primary Responsibility for Promulgating the Federal Rules.

Congress, by the enactment in 1934 of the Rules Enabling Act, 28 U. S. C. § 723 b *et seq.*, (current version at 28 U. S. C. §§ 2071, 2072 (1970)), empowered the United States Supreme Court to promulgate rules of practice and procedure in the district courts. Upon taking effect, the Federal Rules of Civil Procedure acquired the force of federal statutes, controlling all district courts. *Sibbach* v. *Wilson & Company*, 312 U. S. 1, 13 (1941); *United States* v. *Brandt*, 8 F. R. D. 163, 164-65 (D. Mont. 1948); *C. J. Wieland & Son Dairy Products Co.* v. *Wickard*, 4 F. R. D. 250, 252 (E. D. Wis. 1945).

The proper construction and application of the Federal Rules has traditionally been a subject of great concern to this Court. *See, e.g., Schlagenhauf* v. *Holder*, 379 U. S. 104, 111-12 (1964); *La Buy* v. *Howes Leather Co.*, 352 U. S. 249, 256 (1957); *Los Angeles Brush Mfg. Co.* v. *James*, 272 U. S. 701, 706 (1927).[8] Indeed, this Court has manifested its responsi-

8. This Court, since the enactment of the Federal Rules in 1938, has interpreted and given guidelines for proper application of the vast majority of the extant rules. *See, e.g., Beacon Theatres* v. *Westover*, 359 U. S. 500 (1959) (Rules 1, 2, 18, 38, 42 & 57); *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U. S. 530 (1949) (Rules

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bilities with respect to the rules by allowing the extraordinary writ of mandamus to issue where a lower court has acted in derogation of the rules. In *Los Angeles Brush Mfg. Co.*, Chief Justice Taft, for a unanimous court, stated:

> "[W]e think it clear that where the subject concerns the enforcement of the . . . rules which by law it is the duty of this court to formulate and put in force, ... it may use its power of mandamus and deal directly with the district court in requiring it to conform to them." 272 U. S. at 706.

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3 & 4); *Hanna* v. *Plumer*, 380 U. S. 460 (1965) (Rule 4); *Jones & Laughlin Steel Corp.* v. *Gridiron Steel Co.*, 382 U. S. 32 (1965) (Rule 6); *Conley* v. *Gibson*, 355 U. S. 41 (1957) (Rules 8 & 12); *Southern Construction Co.* v. *Pickard*, 371 U. S. 57 (1962) (Rule 13); *Owen Equipment & Erection Co.* v. *Kroger*, 437 U. S. 365 (1978) (Rule 14); *United States* v. *Hougham*, 364 U. S. 310 (1960) (Rules 15 & 16); *Van Dusen* v. *Barrack*, 376 U. S. 612 (1964) (Rule 17); *Provident Tradesmen Bank & Trust Co.* v. *Patterson*, 390 U. S. 102 (1968) (Rule 19); *United States* v. *Mississippi*, 380 U. S. 128 (1965) (Rule 20); *State Farm Fire & Casualty Co.* v. *Tashire*, 386 U. S. 523 (1967) (Rule 22); *American Pipe & Construction Co.* v. *Utah*, 414 U. S. 538 (1974) (Rules 23 & 24); *Ross* v. *Bernhard*, 396 U. S. 531 (1970) (Rules 23.1, 38 & 42); *Robertson* v. *Wegmann*, 436 U. S. 584 (1978) (Rule 25); *Hickman* v. *Taylor*, 329 U. S. 495 (1947) (Rules 26-37); *Link* v. *Wabash Railroad Co.*, 370 U. S. 626 (1962) (Rule 41); *Farmer* v. *Arabian American Oil Co.*, 379 U. S. 227 (1964) (Rules 45 & 54); *Colgrove* v. *Battin*, 413 U. S. 149 (1973) (Rule 48); *Neely* v. *Eby Construction Co.*, 386 U. S. 317 (1967) (Rule 50); *Weade* v. *Dichmann, Wright & Pugh, Inc.*, 337 U. S. 801 (1949) (Rule 51); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. 100 (1969) (Rule 52); *Mathews* v. *Weber*, 423 U. S. 261 (1976) (Rule 53); *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275 (1946) (Rule 54); *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144 (1970) (Rule 56); *United States* v. *Indrelunas*, 411 U. S. 216 (1973) (Rule 58); *Foman* v. *Davis*, 371 U. S. 178 (1962) (Rules 59, 60 & 73); *Mercer* v. *Theriot*, 377 U. S. 152 (1964) (Rule 61); *Granny Goose Foods, Inc.* v. *Teamsters Local No. 70*, 415 U. S. 423 (1974) (Rule 65); *United States* v. *Reynolds*, 397 U. S. 14 (1970) (Rule 71A); *Woltsohn* v. *Hankin*, 376 U. S. 203 (1964) (Rule 73); *Hill* v. *Hawes*, 320 U. S. 520 (1944) (Rules 77 & 79); *Pitchess* v. *Davis*, 421 U. S. 482 (1975) (Rule 81); *Snyder* v. *Harris*, 394 U. S. 332 (1969) (Rule 82); *United States* v. *Hvass*, 355 U. S. 570 (1958) (Rule 83); and *McCrone* v. *United States*, 307 U. S. 61 (1939) (Rule 86).

Accord, Schlagenhauf v. *Holder*, 379 U. S. at 111-12; *La Buy* v. *Howes Leather Co.*, 352 U. S. at 256.

The instant case represents the first substantive construction of the cost-shifting provisions of Rule 68 by a court of appeals. Its interpretation has resulted in its declination to follow the rule as written. While district and circuit courts unquestionably have the right to interpret the rules, they have no authority to extirpate and effectively nullify them. The court of appeals exceeded its authority and this Court should grant review to remedy that usurpation.

B. Redrafting of the Rules Should Be Done by Legislation, Not Judicial Interpretation.

Under the guise of interpretation, the court of appeals has admittedly redrafted Rule 68. Without regard to the policy arguments for or against a mandatory construction and operation of the rule in a Title VII context, the court of appeals has erroneously encroached upon the legislative function. This Court has consistently held that fundamental changes in the Federal Rules are subjects for rulemaking, not judicial decision. Thus, in *Harris* v. *Nelson*, 394 U. S. 286 (1969), this Court stated: "We have no power to rewrite the Rules by judicial interpretations." 394 U. S. at 298. And in *United States* v. *Robinson*, 361 U. S. 220 (1960), in a case involving interpretation of Federal Rules of Criminal Procedure 37(a)(2) and 45(b), this Court stated:

> "That powerful policy arguments may be made both for and against greater flexibility . . . is indeed evident. But that policy question, involving, as it does, many weighty and conflicting considerations, must be resolved through the rule-making process and not by judicial decision." 361 U. S. at 229.

Further, in *United States* v. *Isthmian Steamship Co.*, 359 U. S. 314 (1959), in response to the Government's arguments that the setoff and cross-libel procedures and rules operative in

admiralty proceedings were in need of revision, Chief Justice Warren declared for a unanimous court:

> "The Government contends that . . . the rule has become an anachronism and is out of line with the practice in specific courts and with the general rules of practice for federal courts. But it should be observed that where the procedure has been changed in this regard it has been the result of legislation or rulemaking and not the decisional process. . . . We think that if the law is to change it should be by rulemaking or legislation and not by decision." 359 U. S. at 422-23.

Rule 68 is an important and integral part of the rules governing litigants in federal courts. Although wide usage of the rule by defendants was not initially forthcoming,[9] it now appears to be gaining, particularly in suits similar to the instant one.[10] Moreover, several state legislatures have adopted identical provisions as Rule 68[11] and state courts are relying on the federal courts for guidance in applying their respective rules. *See, e.g. Hernandez* v. *Travelers Insurance Co.*, 331 So. 2d 329, 331 (Fla. App. 1976); *Santiesteban* v. *McGrath*, 320 So. 2d 476, 478 (Fla. App. 1975); *Davis* v. *Olson*, 513 P. 2d 475, 481 (Alaska 1973). This Court has in the past noted and accepted its important responsibility to provide the necessary guidance in the application of the Federal Rules. As stated by Justice Goldberg in *Schlagenhauf*:

> "[T]he issue concerns the construction and application of the Federal Rules of Civil Procedure. It is thus appropriate for us to determine on the merits the issues presented and to formulate the necessary guidelines in this area." 379 U. S. at 112.

9. *See* Note, *Rule 68: A "New" Tool For Litigation*, 1978 DUKE L. J. 889 (1978).

10. *See, e.g. Premier* v. *Carter*, 489 F. 2d 1377 (7th Cir. 1973); *Scharff* v. *Beck*, 452 F. Supp. 1254 (D. Colo. 1978); *Read* v. *Baker*, 438 F. Supp. 737 (D. Del. 1977), *aff'd*, 577 F. 2d 728 (3d Cir.), *cert. denied*, 439 U. S. 869 (1978); *Dual* v. *Cleland*, 79 F. R. D. 696 (D. D. C. 1978); *see generally* SCHLEI AND GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, 1145-46 (1976).

11. *See, e.g.* Alaska R. Civ. P. 68; Ariz. R. Civ. P. 68; D. C. R. Civ. P. 68; Fla. R. Civ. P. 1.442; Nev. R. Civ. P. 68.

This Court should grant review and give the reasoned guidance required. That responsibility should not be abdicated and conferred upon a court of appeals. The conclusion of this Court in *United States* v. *Robinson*, 361 U. S. 220 (1960), is particularly compelling herein: "Whatever may be the proper resolution of the policy question involved, it was beyond the power of the Court of Appeals to resolve it." 361 U. S. at 230.

III.

Title VII Cases Do Not Warrant a Redrafting of Rule 68.

The court of appeals held that its decision was applicable only to Title VII cases. (600 F. 2d at 702, A7.) This result is contrary to clearly established precedent of this Court.

A. Exceptions to the Federal Rules Are Not Favored.

This Court has consistently held that in order to provide certainty to district courts and avoid confusion by litigants, a uniform application of the Federal Rules is required. *See, e.g. United States* v. *Indrelunas*, 441 U. S. 216, 219-21 (1973); *United States* v. *F. & M. Schaefer Brewing Company*, 356 U. S. 227, 230-31 (1958); *City of Morgantown* v. *Royal Insurance Co., Ltd.*, 337 U. S. 254, 258 (1949); *see also* cases cited note 8 *supra*.

More specifically, this Court has rejected arguments that particular kinds of cases warrant dispensations from the unambiguous requirements of the Federal Rules. Thus, in *Eisen* v. *Carlisle & Jacquelin*, 417 U. S. 156 (1974), in a case interpreting the requirements of Rule 23(c)(2), the Court stated:

> "The short answer to these arguments is that individual notice to identifiable class members is not a discretionary consideration to be waived in a particular case. It is, rather, an unambiguous requirement of Rule 23. . . . There is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs." 417 U. S. at 176.

And in *First National Bank of Arizona* v. *Cities Service Co.*, 391 U. S. 253 (1968), this Court explicitly rejected the suggestion that Rule 56(e) should, in effect, be read out of antitrust cases. 391 U. S. at 289-90.

Title VII claimants do not require the obsequiousness bestowed by the court of appeals in the instant case. If that result had been intended, Congress could have amended Rule 68 when it enacted the Civil Rights Act of 1964. It did not, therefore the subsequently enacted law should be interpreted compatibly with the Federal Rules. *See Untermeyer* v. *Fidelity Daily Income Trust*, 79 F. R. D. 36, 45 (D. Mass. 1978). Rule 68, in its plainly written terms, should apply equally to Title VII litigants. *See* SCHLEI & GROSSMAN, *supra* at 1146; *cf. Jones* v. *City of San Antonio*, 568 F. 2d 1224, 1226 (5th Cir. 1978) (Applying Rule 54(d) without exception for Title VII claimant); *Bormann* v. *Long Island Press Publishing Co.*, 379 F. Supp. 951, 954 (E. D. N. Y. 1974) (Applying Rule 23 without exception for Title VII claimant).

B. The Court of Appeals Ignored This Court's Decision in Christiansburg Garment Co. v. EEOC.

The court of appeals suggests that were it forced to follow the plain language of Rule 68, such an approach might "chill the pursuit" to seek judicial relief by individuals injured by racial discrimination. (600 F. 2d at 701, A6.) Delta submits that such fears, if relevant, are unfounded. A legitimate Title VII plaintiff is afforded vast protection without emasculating Rule 68.

If plaintiff prevails, costs *and* attorneys' fees are generally awarded. Civil Rights Act of 1964, *as amended*, 42 U. S. C. § 2000e-5(k).[12] This is clearly contrary to the normal operation of our legal system, but is based upon the desire to protect those wronged by discriminatory treatment in seeking redress. This Court has further protected Title VII plaintiffs by declaring that attorneys' fees will not be awarded to successful defendants unless the action brought is frivolous, unreasonable or vexatious. *Christiansburg Garment Co.* v. *Equal Employment Opportunity Commission*, 434 U. S. 412, 422 (1978). Of critical importance to the instant case, however, is the fact that in *Christiansburg*, this Court interpreted a statute which specifically provided for the allowance of attorney's fees *in the court's discretion*. Its opinion was intended to give guidance to district courts forced to exercise the discretion directed by the statute. This Court indicated that there were policy reasons for treating prevailing defendants differently than prevailing plaintiffs, thus the articulation of diverse standards with respect to awarding attorneys' fees.

Rule 68, however, expresses no latitude. It provides for no discretion, and needs no guided interpretation.[13] Its application is limited solely to defendants who offer to settle, prior to trial, in an amount in excess of that which plaintiff ultimately receives. It insures only costs, not attorneys' fees, and its operation is clearly mandatory. It is intended to protect, as it should, a defendant who is willing to settle a case by giving plaintiff *more* than the court eventually decides plaintiff is due. How can that possibly "chill" a legitimate plaintiff? It may force an honest appraisal of the worthiness of plaintiff's claim; but isn't that what the rule is intended to do?

Rule 68 fills a void. It fairly protects a defendant who wants to avoid litigation, and settle at an amount in excess of that due the plaintiff. It protects that defendant by insuring that at

12. "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person." 42 U. S. C. § 2000e-5(k).

13. The drafters of the Federal Rules were well aware of the specific means for vesting lower courts with discretion. The explicit language "in its discretion" or "unless the court otherwise (directs) orders" is used in Federal Rules 6(b), 12(a), 15(a), 16, 24(b), 26(a), 26(b), 26(d), 29, 54(d), 58, 62(a), 62(b), 62(c), 63 and 71A(h).

least the costs of litigation, absent attorneys' fees, will be awarded. In the *Christiansburg* case this Court interpreted the Congressional instruction (that a court may grant attorneys' fees to the prevailing party in a Title VII case) to mean that a prevailing defendant may be granted attorneys' fees when the suit is frivolous or vexatious. This is a lower standard for the imposition of attorneys' fees than the common law standard of "bad faith". *See Christiansburg* v. *EEOC*, 434 U. S. at 417 n. 9. Apparently Congress and this Court did not feel that this lowered standard would "chill the pursuit" of legitimate Title VII plaintiffs.

Likewise, the intended mandatory operation of Rule 68 will not "chill" the legitimate Title VII plaintiff.

IV.

The Court of Appeals Ignored Its Own Standards in Denying Delta Costs.

Assuming, *arguendo*, that the court of appeals had some basis for revising Rule 68 and substituting its discretionary test, it nonetheless abused its discretion by not awarding costs to Delta.

In the first instance, wholly apart from the standards of Rule 68, are the prescriptions of Rule 54(d). As previously discussed (see Argument I, B, *supra*) Rule 54(d) embodies the long evolved principle that a prevailing party is entitled to its reasonable litigation costs. The Seventh Circuit has, in response to situations involving denial of costs to prevailing parties, referred to such denial as a "penalty" and has adopted a requirement that to extract such a "penalty" a trial court must indicate that defendant engaged in bad faith or deliberate confusion. *Chicago Sugar Co.* v. *American Sugar Refining Co.*, 176 F. 2d 1, 11 (7th Cir. 1949), *cert. denied*, 338 U. S. 948 (1950). Furthermore, the Seventh Circuit has indicated that it is the

unsuccessful party's burden to show that the prevailing party should be penalized by a denial of costs. *Popeil Brothers, Inc.* v. *Schick Electric, Inc.*, 516 F. 2d 772, 776 (7th Cir. 1975). This latter requirement cannot be met by a mere showing that "the unsuccessful party was an ordinary party acting in good faith." *Id.*

In the instant case neither the trial court nor the court of appeals gave any indication that Delta acted in bad faith. To the contrary, although stating that the case was not frivolous (A18), the court of appeals held that plaintiff's evidence was "superficial, incomplete, inadequate or otherwise defective." (A16.) Similarly, the trial court stated that it had "no difficulty in reaching its decision." (A24.) Neither court suggested that Delta had done anything wrong, either in its treatment of plaintiff or in its conduct at trial. Accordingly, by the appellate court's own standards, Delta should have been awarded costs pursuant to Rule 54(d). To hold otherwise is clearly an abuse of discretion.

Secondly, even under the court of appeals newly articulated standard for the operation of Rule 68 in a Title VII case, Delta should have been awarded costs. The test is that the offer must have been made in good faith and have had some reasonable relationship (whatever that means) to the issues, litigation risks and expenses of the case. (600 F. 2d at 702, A7.)

Consider the untenable position Delta was placed in at the outset of the instant suit. It discharged a flight attendant who was not properly performing her job. Through no fault of its own, a lawsuit was not filed until a year and five months later; requesting back pay and reinstatement, and claiming damages for alleged defamation. Delta was convinced that it had violated no law and had not defamed plaintiff, yet it faced expensive and protracted litigation. Attempts to settle were unsuccessful; the plaintiff was obdurate. There could be no assurance, even when ultimately successful in defense, that Delta would recover court costs, much less attorneys' fees. Therefore,

based on its absolutely correct appraisal that it had done nothing wrong, it offered nevertheless to have judgment taken against it and actually pay a sum of $450 to a plaintiff *who deserved nothing*.

The gnawing question, left unanswered by the court of appeal's redrafting of Rule 68 and its imposition of a new test is, simply, what is a reasonable good faith amount which must be offered to someone who has not been wronged and deserves *nothing*? Under these circumstances, it is, we respectfully submit, an incredible determination that Delta's offer was not made in good faith.

The test used by the court of appeals is not supported by the clear language of Rule 68; but beyond that, the district court and court of appeals' determination is not supported by the test. This Court should grant review to redress this obvious abuse of discretion.

V.

CONCLUSION.

The court of appeals compounded failures herein, first by ignoring the unambiguous application of Rule 68, second by rewriting Rule 68 for Title VII plaintiffs, third by failing to follow its own redrafted rule, have brought to life Voltaire's admonition that: "I was never ruined but twice—once when I gained a lawsuit, and once when I lost one."

This Court should not countenance such an untoward result. Accordingly, a writ of certiorari should issue for review of the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDICES.

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APPENDIX A.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 28, 1979

Before

HON. ROBERT A. SPRECHER, *Circuit Judge*
HON. PHILIP W. TONE, *Circuit Judge*
HON. HARLINGTON WOOD, JR., *Circuit Judge*

ROSEMARY AUGUST,
Plaintiff-Appellee,

No. 78-2312 vs.

DELTA AIR LINES, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77 C 95
Julius J. Hoffman, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above entitled cause by counsel for the defendant-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX B

In the United States Court of Appeals
For the Seventh Circuit

No. 78-1313

Rosemary Arneson,

Plaintiff-Appellee

v.

Delta Air Lines, Inc.,

Defendant-Appellant

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
No. 77 C 93 — Joseph L. Hoffman, *Judge*.

Argued February 20, 1979 — Decided July 6, 1979

Before Wisdom,[*] Tone and Wood, *Circuit Judges*.

Wood, *Circuit Judge*. The issue presented in this appeal is whether the awarding of costs under Rule 68 of the Federal Rules of Civil Procedure is mandatory or discretionary if the final judgment obtained by plaintiff is not more favorable than the defendant's offer. In January 1977 the plaintiff-appellee Rosemary Arneson, after receipt of a right to sue letter from the Equal Employment Opportunity Commission, initiated an action against the defendant-appellant Delta Air Lines, Inc., alleging, inter alia, that she was discharged from her position as flight attendant solely because she was black. The plaintiff sought reinstatement, back pay, benefits, other equitable relief, and

attorneys' fees and costs pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

On May 12, 1977, after discovery had commenced, the defendant made an offer of judgment to plaintiff in the amount of $4430, including costs and attorneys' fees accrued to date, pursuant to Rule 68 of the Federal Rules of Civil Procedure.[1] Plaintiff rejected the offer.

After an extended 15 day bench trial on the discrimination charge, the district court held that although the plaintiff had produced some evidence tending to show racial discrimination, she had failed to carry the burden of proving racial discrimination in accordance with *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).[2] Accordingly, the trial judge entered judgment in favor of the defendant and ordered each party to bear its own costs of litigation.

1 Rule 68 provides:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

2 This court has affirmed the district court on the merits of the Title VII claim by a separate order issued this date pursuant to Circuit Rule 35.

Pursuant to Rule 68 the defendant then filed a motion for costs incurred after the date of the Rule 68 offer. The motion was denied.[3] We affirm and add only a few comments in support of Judge Hoffman's holding. At the time the order was timely tendered, the plaintiff's alleged actual damages from the loss of her employment for the preceding 19 months exceeded $20,000, not including attorneys' fees and costs. Plaintiff also anticipated possible reinstatement as a flight attendant. Although plaintiff did not succeed in her discrimination claim, it was not frivolous. Plaintiff presented some evidence suggesting racial bias. The trial judge found that plaintiff, although guilty of

3. In denying the motion, Senior District Court Judge Hoffman explained:

> While there is little authority on the point, this court is satisfied that in order to be effective, a Rule 68 offer must be made in a good faith attempt to settle the parties' litigation and, thus, must be at least arguably reasonable. . . .
>
> If the purpose of the rule is to encourage settlement, it is impossible for this court to concede that this purpose can be furthered or aided by an offer that is not at least arguably reasonable.
>
> At the time this offer of $450 was made this litigation was approximately four months old. While the offer was intended to be received in full settlement of the parties' dispute, it is unlikely that such a small sum of money would even have fully satisfied the plaintiff's then incurred costs in attorneys fees.
>
> It must also be remembered that the plaintiff was given some encouragement as to the merit of her claim from the findings of the Equal Employment Opportunity Commission. Additionally, a successful litigant in a Title VII case is as a general rule entitled not only to reinstatement, but also to back pay plus costs and attorneys fees.
>
> Finally, while the court did ultimately find itself constrained to enter its judgment for the defendant, the court certainly did not find the plaintiff's claim to be wholly specious. In the opinion of this court and in the particular facts and circumstances of this case, an offer of only the sum of $450 could only have been effective were the plaintiff's claim totally lacking in merit or were there present additional factors which would mitigate in favor of the defendant.
>
> For the reasons I have stated, the court concludes that the defendant's Rule 68 offer of May 12, 1977 did not constitute an effective offer.

poor and unacceptable performance, rendered good service on occasion. Her file revealed a record of some company awards and compliments from co-workers and passengers.

Against that general background, the Rule 68 offer of judgment of less than $500 before trial is not of such significance in the context of this case to justify serious consideration by the plaintiff. At oral argument the defendant urged that even an offer of $10 would have met the requirements of Rule 68 and served the purpose of shifting cost liability. If that were so, a minimal Rule 68 offer made in bad faith could become a routine practice by defendants seeking cheap insurance against costs. The useful vitality of Rule 68 would be damaged.[4] Unrealistic use of the rule would not encourage settlements, avoid protracted litigation or relieve courts of vexatious litigation.

The defendant's arguments to the contrary that the allowance of costs is automatic and non-discretionary evidences that the issue is not free from doubt. The defendant points to the language of the rule where there is no specific requirement that the offer be "reasonable" or in "good faith." If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree "*must*" pay the costs incurred after the making of the offer. Fed. R. Civ. P. 68. The defendant contends that it is entitled to the benefit of the rule if the technical requisites of the rule have been observed.

The defendant claims that, unless Rule 68 is rigidly followed, the rule will overlap the trial judge's express discretion under Rule 54(d), which provides costs to the prevailing party unless

4. The concept originated in state practice and was novel to the federal courts when the federal rules were adopted in 1938. C. Wright & A. Miller, *Federal Practice and Procedure* Civil § 3001 (1973). The general principle was enunciated in *Crutcher v. Joyce*, 146 F. 2d 518, 520 (10th Cir. 1945), where the Tenth Circuit, sitting as an equity court and without referring to the rule, held that a plaintiff may be denied costs when he sues vexatiously after refusing an offer of settlement and then recovers practically the same sum previously offered. At least in cases such as that, Rule 68 provides a just and fair procedure to all concerned parties.

the court directs otherwise. In spite of the force of these arguments, we are not persuaded.

Title VII embodies a basic national policy given a high priority by Congress and contains an authorization for the award of attorney's fees intended to encourage aggrieved individuals to seek redress for violations of their civil rights. *Christianburg Garment Co.* v. *Equal Employment Opportunity Commission*, 434 U. S. 412 (1977); *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400 (1968). In considering the counsel fee provision under Title II of the Civil Rights Act of 1964, 42 U. S.C. § 2000a-3(b), similar to the present provision of Title VII, 42 U. S. C. § 2000e-5(K), the Supreme Court in *Newman* v. *Piggie Park Enterprises, Inc.*, explained that the counsel fee provision was "to encourage individuals injured by racial discrimination to seek judicial relief." 390 U. S. at 402. We do not propose to permit a technical interpretation of a procedural rule to chill the pursuit of that high objective.

The other cases which have considered this Rule 68 issue are limited. Defendant relies on *Mr. Hanger, Inc.* v. *Cut Rate Plastic Hangers, Inc.*, 63 F. R. D. 607 (E. D. N. Y. 1974), and *Dual* v. *Cleland*, 79 F. R. D. 696 (D. D. C. 1978). In *Mr. Hanger* the plaintiff was unsuccessful in a patent infringement suit and was assessed with the defendant's defense costs. There the plaintiff argued that the Rule 68 offer was a "tactical sham," unreasonable and in bad faith. Although the court considered Rule 68 as mandatory, the district court nevertheless pointed out that the offer afforded the plaintiff substantially all the relief prayed for in the complaint and was not a sham.

In *Dual* the district court in a Title VII case ruled in favor of defendants after a trial on the merits. The court considered the application of Rule 54(d) which specifically provides for the exercise of discretion and Rule 68 which does not. Viewing the rule as automatic, the district court allowed costs to the defendant under Rule 68 but not under Rule 54(d). The issues of reasonableness and good faith apparently were not raised in

Dual, although the court noted that the plaintiff, albeit unsuccessful, had a good faith claim.

The plaintiff argues that her position is supported by *Perkins* v. *New Orleans Athletic Club*, 429 F. Supp. 661 (E. D. La. 1976), and *Honea* v. *Crescent Ford Truck Sales, Inc.*, 394 F. Supp. 201 (E. D. La. 1975), but that support is at best only inferential.

For the considerations stated above, we believe that a liberal, not a technical, reading of Rule 68 is justified, at least in a Title VII case. We need not decide whether this same approach should be taken in other kinds of cases. In a Title VII case the trial judge may exercise his discretion and allow costs under Rule 68 when, viewed as of the time of the offer along with consideration of the final outcome of the case, the offer can be seen to have been made in good faith and to have had some reasonable relationship in amount to the issues, litigation risks, and expenses anticipated and involved in the case.

AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C.

[1] IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

ROSEMARY AUGUST, *Plaintiff*,
vs.
DELTA AIR LINES, *Defendant*.
No. 77 C 95

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the HON. JULIUS J. HOLTMAN, one of the Senior Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Monday, September 18, 1978, at the hour of 10:00 o'clock a.m.

Appearances:

Messrs. Glazer & Vance
179 W. Washington Street, Room 1125
Chicago, Illinois 60602
By: Ms. Susan Margaret Vance, appeared on behalf of the plaintiff,

Messrs. Schiff, Hardin & Waite
233 South Wacker Drive
Chicago, Illinois 60606,
By: Mr. E. Allan Kovar, appeared on behalf of the defendant.

[2] The Clerk: 77 C 95 Rosemary August v. Delta Airlines, Incorporated, motion for hearing and decision on defendant's pending motion for costs pursuant to Rule 68.

Mr. Kovar: This, your Honor, is also the defendant Delta Air Lines' motion. As you recall there is currently a Rule 68 motion pending before the Court, which has been fully briefed.

And we have here, pursuant to Rule 15(d), requested the Court for a determination on this because of the pending appeal and because of the imminence of that appeal. As noted, the appellant's brief is due on the 29th of this month and our brief, of course, is due within thirty days thereafter. We do believe that a determination of the Rule 68 motion is relevant and significant to that appeal.

The Court: You style your motion, "Motion for a hearing and decision on defendant's pending motion for costs pursuant to Rule 68." Did I not see in the advertisement that Delta Air Lines, Incorporated, next to United, was the most solvent and most prosperous airline in the country and you are concerned about—

Mr. Kovar: I certainly hope so, your Honor.

The Court: And you want to hurry me into this decision on a small matter like this.

Mr. Kovar: No. We are most appreciative, your Honor, [3] of your own heavy schedule. The only reason we filed this motion was because of the pendency of the appeal and we believed the relevancy of this decision and the importance of it possibly to the appellate court.

The Court: Do you want to say anything?

Ms. Vance: No, your Honor, the plaintiff has nothing to say at this time.

The Court: There is now outstanding in this case a motion by the defendant Delta Air Lines for its costs of litigation. By the instant motion the defendant now seeks a ruling on that motion.

In its memorandum of decision in this case, the Court exercised its discretion under Rule 54(d) of the Federal Rules of Civil Procedure and ordered each party to bear its own costs of litigation. By the instant motion the defendant Delta Air

Lines now moves pursuant to Rule 68 of the Federal Rules of Civil Procedure for an order directing the plaintiff to reimburse it for all costs incurred by Delta since May 12, 1977.

In support of this motion, the movant submits with the motion a copy of the offer of judgment made by Delta to the plaintiff on May 12, 1977. By that offer Delta offered to pay her $4,500.00 in full settlement of this litigation.

[1] Under Rule 68 of the Federal Rules of Civil Procedure at any time more than ten days before the trial begins a party defending against the claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or the effect specified in his offer with costs then accrued. An offer not accepted is deemed withdrawn and evidence thereof is not admissible, except in a proceeding to determine costs.

If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

The threshold question that must be resolved is whether a Rule 68 motion is proper in the face of an order by the Court pursuant to Rule 54(d) that each party must bear its own costs of litigation. This Court need spend but little time on that issue as it has already been fully considered and resolved in the recent case of Mr. Hanger, Incorporated v. Cut Rate Plastic Hangers, Incorporated, 63 FRD 607, (E.D. of N.Y. 1974).

There the Court held, and this Court must agree, that a party may recover its litigation costs under Rule 68, even though the Court has previously denied costs pursuant to Rule 54(d). In so concluding the Court does not, however, determine that the defendant Delta Air Lines is now entitled to recover its costs of litigation pursuant to Rule 68 of the Federal Rules of Civil Procedure.

[2] While there is little authority on the point, this Court is satisfied that in order to be effective, a Rule 68 offer must be

made in a good faith attempt to settle the parties' litigation and, thus, must be at least arguably reasonable.

The very purposes of Rule 68 of the Federal Rules of Civil Procedure, as well as the few authorities which have addressed the issue of this application, mandate this conclusion as stated in the Advisory Committee's Note to Rule 68, the purpose of this rule is "to encourage settlements and avoid protracted litigation." Or as stated in Stoffend v. Lake Central Airlines, Inc., 1 F.R.D. 218 (N.D. Ohio 1969), "Rule 68 is intended to encourage early settlements of litigation. It is also intended to protect the party who is willing to settle from the burden of costs which subsequently accrue." 47 F.R.D. at Page 219.

If the purpose of the rule is to encourage settlement, it is impossible for this Court to concede that this purpose can be furthered or aided by an offer that is not at least arguably reasonable.

The few cases which have addressed this aspect of Rule 68 support this conclusion. In Perkins v. New Orleans Athletic Club, 429 F. Supp. 661 (E.D. La. 1976), the Court, in deciding a request for attorneys fees, noted that under Rule 68 a [a] defendant "may offer what is really due and put the burden of costs on the plaintiff."

Additionally, in Honea v. Cresent Ford Truck Sales, Incorporated, 394 F. Supp. 201 (E.D. La. 1975) the Court stated that "if a reasonable offer is spurned, Rule 68 of the Federal Rules of Civil Procedure provides a manner in which a party can stop costs from accruing." 394 F. Supp. at Page 202. This requirement that the Rule 68 offer must be reasonable, at least arguably so, would also appear to be supported by Baldwin Cooke Company v. Keith Clark, Incorporated, 73 F.R.D. 564 (N.D. Ill. 1976).

Finally, the Court notes the decision of the United States Custom Court Judge in Mr. Hanger, Incorporated v. Cut Rate Plastic Hangers, Incorporated, 63 F.R.D. 607, (E.D. N.Y.

1974). In that case in awarding costs pursuant to a Rule 68 offer, Judge Reed rejected arguments that the offer there involved was "a sham." He also found that it was not made "in bad faith." Instead he concluded the offer was a "proper offer."

By the motion now before this Court, the Court must now decide whether in the specific facts and circumstances of this case the defendant's offer of May 12, 1977 in the sum of $450 sufficiently satisfied Rule 68 of the Federal Rules of Civil Procedure to warrant the [7] entry of the order now sought.

In the opinion of the Court it did not. For this reason the motion made pursuant to Rule 68 will be denied. At the time this offer of $450 was made this litigation was approximately four months old. While the offer was intended to be received in full settlement of the parties' dispute, it is unlikely that such a small sum of money would even have fully satisfied the plaintiff's then incurred costs in attorneys fees.

It must also be remembered that the plaintiff was given some encouragement as to the merit of her claim from the findings of the Equal Employment Opportunity Commission. Additionally, a successful litigant in a Title VII case is as a general rule entitled, not only to reinstatement, but also to back pay plus costs and attorneys fees.

Finally, while the Court did ultimately find itself constrained to enter its judgment for the defendant, the Court certainly did not find the plaintiff's claim to be wholly specious. In the opinion of this Court and in the particular facts and circumstances of this case, an offer of only the sum of $450 could only have been effective were the plaintiff's claim totally lacking in merit or were there present additional factors which would mitigate in favor of the defendant.

[8] For the reasons I have stated, the Court concludes that the defendant's Rule 68 offer of May 12, 1977 did not constitute an effective offer under that rule—offer of settlement under that rule. For that reason, Mr. Clerk, the motion of the defendant

Delta Air Lines, Incorporated for costs pursuant to Rule 68 of the Federal Rules of Civil Procedure will be denied. As previously ordered each party to this action will bear its own costs of litigation.

Mr. Kovar: Thank you, your Honor.

Ms Vance: Thank you, your Honor.

* * * * *

[9] IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

ROSEMARY AUGUST, *Plaintiff,* vs. DELTA AIR LINES, *Defendant.*	Civil Action No. 77 C 95

CERTIFICATE

I, Joan M. Unzicker, do hereby certify that the foregoing is a true, accurate, and complete transcript of the proceedings had in the above-entitled cause before the Hon. Julius J. Hoffman, one of the Judges of said Court, in his courtroom at Chicago, Illinois, on September 18, 1978.

/s/ JOAN M. UNZICKER
Official Court Reporter
United States District Court
Northern District of Illinois

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

Name of Presiding Judge, Honorable Julius J. Hoffman

Cause No. 77 C 95 Date September 18, 1978

Title of Cause—Rosemary August v. Delta Air Lines, Inc.

Brief Statement of Motion—Motion for Hearing and Decision on Defendant's Pending Motion for Costs Pursuant to Rule 68.

Names and Addresses of moving counsel—E. Allan Kovar, Max G. Brittain, Jr., Schiff Hardin & Waite, 7200 Sears Tower, 233 S. Wacker, Chicago, 60606.

Representing—Defendant Delta Air Lines.

Names and Addresses of other counsel entitled to notice and names of parties they represent—Carole K. Bellows, Bellows & Bellows, One IBM Plaza, Suite 14, Chicago; Susan M. Vance, Glazer & Vance, 179 W. Washington, Chicago; Plaintiff Rosemary August.

Defendants motion for costs pursuant to Rule 68 is denied Hoffman S. J.

APPENDIX D.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Unpublished Order Not to be Cited
Per Circuit Rule 35

(Argued February 20, 1979)

July 6, 1979.

Before

HON. ROBERT A. SPRECHER, *Circuit Judge*
HON. PHILIP W. TONE, *Circuit Judge*
HON. HARLINGTON WOOD, JR., *Circuit Judge*

ROSEMARY AUGUST,
Plaintiff-Appellant,

vs.

No. 78-1933

DELTA AIRLINES, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 77 C 95

Julius J. Hoffman, *Judge.*

ORDER.

Rosemary August initiated this Title VII action against defendant Delta Air Lines, Inc. alleging, *inter alia*, that she was discharged from her position as flight attendant solely because she was black. August sought reinstatement, back pay, benefits,

other equitable relief and attorneys' fees and costs pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* After a bench trial the district court entered judgment in favor of the defendant. The plaintiff has appealed on the ground that the decision was unsupported by the evidence and that the district court improperly applied the law.[1] We affirm and add only a few observations to supplement the trial court's memorandum of decision and order entered on June 9, 1978.

Plaintiff offered some proof which suggested that she may have been subject to discrimination, but the evidence was superficial, incomplete, inadequate or otherwise defective. The evidence failed to establish that she was treated differently than similarly situated whites. The evidence from which it appeared that blacks on occasion may have received some preferential treatment was inconclusive in the absence of the complete files pertaining to the allegedly preferred employees and others similarly situated. The plaintiff, who had the burden of proving discrimination, selected only isolated instances for comparison of treatment. Complete personnel records of other flight attendants were not produced to help establish a basis for meaningful comparison of those employees similarly situated. *See Turner v. Texas Instruments, Inc.*, 555 F.2d 1251, 1257 (5th Cir. 1977). The statistical evidence was incomplete and based only upon limited samples which may or may not have truly reflected what they purported to show.[2] *See generally Mayor of Philadelphia v. Educational Equality League*, 415 F.2d 603, 620 (1971).

Regardless of the deficiencies of the plaintiff's evidence, the defendant strongly defended the action with a non-discriminatory

1. In conjunction with this order, an opinion has been published this day, affirming the trial court's disposition of the Rule 68 offer of judgment issue in plaintiff's favor.

2. The Equal Employment Opportunity Commission interpretive manual, § 1325.6(c), makes the elementary point that comparative evidence must be complete and relate to a sufficiently large sample, or similarly situated Negroes and Caucasians so as to provide a meaningful basis for drawing a comparison.

explanation." As a result of the charge of her fourth no show on December 16, 1974, the plaintiff was placed on indefinite suspension in accordance with the rules of Delta Air Lines. On January 2, 1975, the regional manager for Delta reviewed the plaintiff's file and informed her that she was on "last chance status" saying:

> Contents within your file revealed innumerable discrepancies ranging from no shows, poor conduct while pass riding, lateness, co-worker write-ups and passenger complaints.
>
> Actions such as you've demonstrated will no longer be tolerated. You have been adequately warned and previously disciplined because of your continuing unsatisfactory job performance. By copy of this letter you are notified that this is your final warning and any future infraction will result in the termination of your employment with Delta Air Lines.

3. The following is a brief summary of the plaintiff's infractions while working with Delta Air Lines:

7 8 72	No show	4 30 78	Co-worker complaint
7 19 72	Co-worker complaint	5 5 74	Passenger complaint
7 21 72	No show	5 15 74	Discrepancy report
8 22 72	No show	6 7 74	Co-worker complaint
9 1 72	Co-worker complaint	6 21 74	Discrepancy report
9 16 72	No show	10 3 74	Discrepancy report
10 1 72	Discrepancy report	10 28 74	No show
10 8 72	Discrepancy report	11 19 74	Co-worker complaint
10 16 72	Two passenger complaints	11 24 74	Discrepancy report
		11 30 74	Co-worker complaint
12 72	Co-worker complaint	12 5 74	Discrepancy report
2 2 73	No show	12 16 74	No show
4 11 73	Discrepancy report	1 11 75	Passenger complaint
6 21 73	Discrepancy report	8 1 75	Co-worker complaint
7 17 73	Discrepancy report	8 11 75	Co-worker complaint
2 5 74	Discrepancy report	8 26 75	Discrepancy report
2 28 74	No show		

After the November 30, 1974, co-worker complaint about the plaintiff's lateness in boarding the plane, the plaintiff, for her third tardiness in 60 days, was suspended for two days. Following the imposition of the suspension, the plaintiff wrote separate letters to her Delta supervisor and base manager apologizing for her lack of responsibility. The plaintiff also told her supervisor, "Getting suspended is exactly what I deserved[.] no one brought this upon myself but me. I'm only grateful I was suspended for 2 days and not three."

After that notification, another passenger complained about the plaintiff's service, two co-workers complained about her unprofessional conduct, and other discrepancy report for tardiness was lodged against her. On August 27, 1975, the plaintiff was asked to resign, and on September 5, 1975, was fired. The record suggests considerable company forbearance without regard to the employee's race. Nonetheless, we do not view this case as frivolous.

We find no violation of the Title VII requirements. *Board of Trustees of Keene State College* v. *Sweeney*, ... U. S. ..... (1978); *Furnco Construction Co.* v. *Waters*, 438 U. S. 567 (1978); *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973).

AFFIRMED.

APPENDIX E.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

ROSEMARY AUGUST, *Plaintiff*,
vs.
DELTA AIR LINES, INC., *Defendant*. } No. 77 C 95

MEMORANDUM OF DECISION AND ORDER.

JULIUS J. HOFFMAN, Senior United States District Judge. This is an action by the plaintiff Rosemary August to recover against her former employer, defendant Delta Air Lines, Inc. The plaintiff's complaint, as originally filed, was in two counts. In Count I, she seeks redress for employment discrimination allegedly practiced by Delta Air Lines. It is her position that in violation of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e, *et seq.*, Delta subjected her to ". . . terms and conditions of employment different from those of her similarly situated Caucasian co-workers . . ." and ultimately discharged her because she is a Negro. As relief, the plaintiff prays for reinstatement, back pay and such other equitable relief as may be proper. She also seeks an award of attorneys' fees and costs. These forms of recovery are expressly provided for in the Act. See 42 U. S. C. § 2000e-5.

Count II of the complaint was brought pursuant to the court's pendent jurisdiction. In that count, the plaintiff alleged that subsequent to her discharge by defendant, she sought employment with several companies, but ". . . has not been hired de-

spite her good qualifications. . . ." Pleading further, the plaintiff states that she ". . . therefore believes that . . . defendant has maliciously caused to be published to prospective employers libelous, slanderous, and defamatory statements concerning the plaintiff and having the effect of preventing her employment." For this alleged defamation, the plaintiff sought actual and punitive damages totalling $150,000.

In its answer, Delta denied all substantive allegations in the plaintiff's complaint. Delta also filed a motion for summary judgment as to Count II, arguing that there was no evidence to support the plaintiff's "belief" that she was being defamed. In support, deposition testimony from the plaintiff and the affidavit of one E. Kendall Allen, a Delta employee, were presented. The plaintiff admitted in her deposition that she was unable to cite any facts to support her "belief" she was being defamed. The affiant stated that no prospective employer inquiries regarding Rosemary August had even been received by Delta. The plaintiff elected not to oppose the motion for summary judgment, and it was granted by the court. This case therefore proceeded to trial only on the plaintiff's allegations of race discrimination in violation of Title VII.

In order for this court to have subject matter jurisdiction in this case, certain procedural prerequisites must have been satisfied. These requirements are detailed in § 706 of the Act, 42 U. S. C. § 2000e-5. First, under sub-part (c):

> In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed (with the Equal Employment Opportunities Commission) before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated. . . . 42 U.S.C. § 2000e-5(c).

More importantly, under sub-part (e) of § 706:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . except that in a case of an unlawful employment practice with respect to which the person aggrieved his initially instituted proceedings with a State or local agency . . . such charge shall be filed . . . within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier. . . . 42 U.S.C. § 2000e-5(e).

The purpose of the State agency filing requirement is to give available State agencies a prior opportunity to consider discrimination complaints. Compliance with this requirement is critical. *Love* v. *Pullman Co.*, 404 U. S. 522, at 524 and 526 (1972). In fact, because these requirements are jurisdictional, the plaintiff has the burden of establishing them by a preponderance of the evidence. A failure to do so will leave the court without subject matter jurisdiction. *Cutliff* v. *Greyhound Lines, Inc.*, 558 F. 2d 803, at 806 (5th Cir. 1977); *Berg* v. *LaCrosse Cooler Co.*, 548 F. 2d 211, at 212 (7th Cir. 1977); *Abshire* v. *Chicago and Eastern Illinois Railroad Co.*, 352 F. Supp. 601 (N. D. Ill. 1972).

At the trial of this cause, Rosemary August presented evidence of compliance with the procedural requirements of § 706. In its post-trial brief, the defendant argued that the plaintiff had not sustained her burden of proof on this issue, and that this court therefore was without subject matter jurisdiction herein. In response to that argument, the plaintiff filed a motion by which she petitioned the court to ". . . reopen the proofs . . . for the limited purpose of further establishing that all jurisdictional requirements . . . have been met by plaintiff." That motion was granted, and a special supplementary proceeding was held for the limited purpose of accepting additional evidence on the jurisdictional issue.

From all the evidence presented, the court finds that because the plaintiff has sustained her burden of establishing compliance with the procedural requirements of § 706 by a preponderance of the evidence, this court does have the requisite subject matter jurisdiction to decide the merits of this litigation. Rosemary August was employed as a flight attendant for Delta Air Lines, Inc. commencing November 22, 1971. Her employment was terminated on or about August 27, 1975. On April 7, 1975, and again on August 28, 1975, she filed charges of unfair employment practices against Delta with the Chicago District Office of the Equal Employment Opportunities Commission. On April 11, 1975, and again on August 29, 1975, the Commission deferred her charges to the Illinois Fair Employment Practices Commission, which is the State agency with authority to address her complaint. From the evidence adduced, the only reasonable conclusion to be reached is that the Fair Employment Practices Commission elected to take no action on Miss August's complaint. Therefore, acting pursuant to its statutory authority, the Equal Employment Opportunities Commission assumed jurisdiction over this matter. On January 4, 1977, it issued its Notice of Right to Sue. The plaintiff then filed her complaint with this court on January 11, 1977.

From these facts it is clear that the time requirements of § 706 have been satisfied. More importantly, this procedure by which the plaintiff filed her charges with the Equal Employment Opportunities Commission, which Commission then deferred those charges to the Illinois Fair Employment Practices Commission for its prior consideration, does comply with the State agency filing requirement of § 706. *Love* v. *Pullman Co.*, 404 U. S. 522 (1972). Therefore, all procedural requirements of Title VII have been satisfied. This court does have jurisdiction to decide the merits of this action.

In Count I of her complaint, Miss August has alleged that she was subjected to employment discrimination on the basis of her Negro race. A number of cases have addressed the proof

requirements in private, non-class actions challenging employment discrimination. In the leading case of *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), the Supreme Court was confronted with a situation where the complainant in a Title VII case alleged that his discharge and the general hiring practices of his former employer were racially motivated. In that case, the Court held that the initial burden of establishing a prima facie case of racial discrimination may be satisfied by a showing (i) that the plaintiff belongs to a racial minority; (ii) that he applied for and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applications from persons of equal qualifications. Assuming this burden of proof is discharged, the burden then shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the individual's rejection. If that is done, the plaintiff then has the additional burden of proving the stated reason was just a pretext for a racially discriminatory decision. *Accord, Flowers* v. *Crouch-Walker Corp.*, 552 F. 2d 1277, at 1281 (7th Cir. 1977); *Kinsey* v. *First Regional Securities, Inc.*, 557 F. 2d 830, at 836 (D. C. Cir. 1977); *Sime* v. *Trustees of California State University and Colleges*, 526 F. 2d 1112, at 1114 (9th Cir. 1975).

While the Court in *McDonnell Douglas Corp.* v. *Green* presented this as one acceptable articulation of the specific elements necessary to establish a prima facie case, it specifically pointed out that the facts will vary in Title VII cases, so that its statement of the prima facie proof required should not be considered ". . . necessarily applicable in every respect to differing factual situations." *Id.*, at page 802, n. 13. The Court again addressed this point in *International Brotherhood of Teamsters* v. *United States*, 431 U. S. 324 (1977), where it gave a more complete statement of the proposition:

> The importance of McDonnell Douglas lies not in its specification of the discrete elements of proof there required,

but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on discriminatory criterion illegal under the Act. 431 U.S. at 358.

See also, McDonald v. *Santa Fe Trail Transportation Co.*, 427 U. S. 273, at 279, n. 6 (1976).

While this court does find the approach articulated in *McDonnell Douglas Corp.* v. *Green* to be instructive, it must conclude that the evidence presented here does not lend itself to the application thereof. But regardless of the approach adopted, what a plaintiff must establish as a minimum in a Title VII case is that he/she is a member of a protected class and that he/she was subjected to disparate treatment which was "racially premised."[1] *International Brotherhood of Teamsters* v. *United States*, 431 U. S. at 335; *see also, Barnes* v. *St. Catherine's Hospital*, 563 F. 2d 324 (7th Cir. 1977). These facts must be established by a preponderance of the net of all the evidence. *Barnes* v. *St. Catherine's Hospital, supra; Henry* v. *Ford Motor Company*, 553 F. 2d 46 (8th Cir. 1977). In other words, in order to prevail, as a minimum, Rosemary August must establish by a preponderance of all the evidence that because she is a Negro, she was subjected to employment standards that were different from those imposed on similarly situated Caucasian flight attendants so that she was terminated while similarly situated Caucasian flight attendants were not. Viewing the evidence presented in this case against these requirements, the court has no difficulty in reaching its decision.

Rosemary August is 27 years old; she is a member of the Negro race. She applied for a position as a flight attendant with Delta Air Lines by sending her employment application to their corporate offices in Atlanta, Georgia in October of

1. This is not to say that a showing of a discriminatory *purpose* is required in Title VII cases. It is clear that there is no such requirement. *Washington* v. *Davis*, 426 U. S. 248 (1976); *United States* v. *City of Chicago*, No. 77-1171 (7th Cir. February 21, 1978).

1971. Following an interview on November 3, 1971, the plaintiff was employed as a flight attendant and, after an initial training period, she was assigned to Delta's base at O'Hare International Airport in Chicago, Illinois. She worked as a flight attendant for Delta until her termination on August 27, 1975.

Delta Air Lines, Inc. is a national airline with its headquarters in Atlanta. It operates various bases throughout the country. The O'Hare base has a Base Manager who is in charge of all Delta flight attendants assigned to that base. Reporting directly to the Base Manager are supervisors. Each supervisor is charged with primary responsibility for a certain number of flight attendants.

From 1971 through October of 1973, the Base Manager at O'Hare Airport was June Kulencamp. Commencing in October of 1973, Nancy Severtsen filled that position. Throughout the period of Miss August's employment her immediate supervisor was Carolyn Powers.

These positions are important both because they are positions of authority and because responsibility for flight attendants' employment files is vested in the Base Manager and supervisors. The importance of this later factor lies in the fact that Delta employment decisions such as advancement, discipline and termination are, to a large extent, made based on what is contained in the flight attendant's file.

A termination decision at Delta normally requires first a determination by the supervisor and Base Manager that a flight attendant has failed to satisfy Delta standards for continued employment. Next, the employee file and a recommendation for termination are sent to the defendant's corporate headquarters in Atlanta where they are reviewed by various management personnel. These people include a member of the defendant's staff of in-house counsel, defendant's Equal Employment Manager, and the corporate Vice-President in charge of personnel. On their concurrence, a Delta flight attendant is terminated.

In the case of Rosemary August these steps were carried out. After Nancy Severtsen and Carolyn Powers decided to recommend her termination, Miss August's records were transmitted to Atlanta. There, they were reviewed by Peter Caldwell, Administrative Assistent-Personnel, Hunter Hughes, one of the defendant's in-house counsel, Richard Ealey, Equal Employment Manager, and R. W. Allen, Vice-President-Personnel Benefits. Each of these individuals agreed with the original recommendation, and Rosemary August was terminated.

The decision to terminate was based on a determination of "poor job performance and attitude". The supervisory personnel involved based this conclusion on their findings that Rosemary August had committed a number of "no-shows" (failures to report for an assignment on time or other equally serious misconduct), that numerous co-worker and passenger complaints had been filed against her, that she was not properly performing her job and that she had been guilty of various Delta policy infractions.

The plaintiff has taken the position that Delta Air Lines' base at O'Hare International Airport had, between 1971 and 1975, a policy or practice of subjecting Negro flight attendants to discriminatory treatment, and that she was the victim of this discrimination. She argues that in the case of Negro employees in general and herself in particular, in making entries into flight attendant's files and in reaching employment decisions, the defendant held Negro attendants to higher or stricter standards than Caucasians. As the court has previously noted, entries in flight attendants' employment files are critical to the defend ant's employment decisions. Therefore, a showing that the defendant was guilty of disparate treatment regarding file compilations would be highly probative of a Title VII violation.

In support of her allegations of disparate treatment, the plaintiff chose not to present for comparison the full employment files of Rosemary August and similarly situated Caucasian flight attendants. As will be more fully developed, she also elected to

make only limited use of statistical data. Instead, her approach was primarily to present evidence to demonstrate that on particular occasions Caucasian flight attendants were treated a certain way while in similar situations either Rosemary August or one of Delta's other Negro flight attendants was dealt with more harshly.

The record presented in this case does establish that Rosemary August did perform her job on various flights in what one individual described as a "top notch" manner. During her career with Delta, she received a number of complimentary letters from passengers, which letters were placed in her file. She was also formally complimented by co-workers on occasion; those compliments were also made a part of her file. More importantly, she also received one Customer Service Award and two Feather-In-Your-Cap Awards. These are awards issued by Delta's corporate office for outstanding service by an employee. They are awarded to a flight attendant who has conducted himself or herself on a flight, or has in some other manner performed his or her duties in an exemplary manner. The Customer Service Award includes Delta Air Lines, Inc. stock certificates, recognition in the Delta Digest, a company newsletter, and a letter of appreciation from the Chairman of Delta's Board of Directors.

However, the record also contains evidence that establishes Mis August was capable of poor or unacceptable performance Her file contains four "no show" citations; it is Delta's established policy that an employee may be subject to dismissal for four such infractions. Her file also contains a number of co-worker and supervisor complaints. Co-workers found that the plaintiff could be offensive in her manner and uncooperative. Additionally a number of letters of criticism were received from passengers. The plaintiff defendant against these complaints by claiming they were not factually correct. She also argued they were not adequately investigated by Delta. The court cannot respect failures to investigate complaints. Nevertheless, the com-

plaints were filed, and they were received from a number of sources.

From all of this evidence, the court concludes that Rosemary August was capable of quality work performance, but was also guilty of carrying out her duties in a manner that was unacceptable to her employer. However, this is not the issue now before the court. What this court must now decide is whether the plaintiff has established by a preponderance of the evidence that two standards of performance were applied at Delta's O'Hare Airport base, and that Rosemary August, as a Negro, was a victim of this double standard. After a thorough review of the record in this case, the court must conclude that this burden has not been met.

The most probing evidence of disparate treatment presented in this case was a showing that in the period from 1972 through 1975, of a total of 34 flight attendants terminated, 10 (or 29%) were Negroes. And when the period is extended through 1976, 13 out of 38 (or 34%) were Negroes. Delta maintains a total staff of approximately 500 flight attendants at its O'Hare base. From the available evidence, approximately one-fifth of that total, or approximately 100 of Delta's flight attendants, are Negroes.

The defendant has argued that where the statistical sample is small as is admittedly the case here, the results obtained should be rejected as meaningless. In support, it cites, *inter alia*, *Mayor of Philadelphia* v. *Educational Equality League*, 415 U. S. 605 (1974); *Robinson* v. *City of Dallas*, 514 F. 2d 1271 (5th Cir. 1975); *Morita* v. *Southern California Permenente Medical Group*, 541 F. 2d 217 (9th Cir. 1976); *Ochoa* v. *Monsanto*, 473 F. 2d 318 (5th Cir. 1973). With this argument, the court does not agree.

In the recent Supreme Court case of *International Brotherhood of Teamsters* v. *United States*, 431 U. S. 324 (1977), the Court did caution that "(c)onsiderations such as a small sample size may, of course, detract from the value of such

evidence, [citing *Mayor of Philadelphia* v. *Education Equality League*, 415 U. S. 605, at 620-621 (1974)]. . . ." However, in that case the Court also noted that wtih proper caution, they can be of assistance to the fact finder in reaching his decision. See *International Brotherhood of Teamsters* v. *United States*, 431 U. S. at 339-340. Other cases are in accord; *see e.g.*, *Burns* v. *Thiokol Chemical Corporation*, 483 F. 2d 300, at 305-307 (5th Cir. 1973); *Equal Employment Opportunity Commission* v. *Eagle Iron Works*, 424 F. Supp. 240 (S. D. Ia. 1976).[2]

While these statististics do constitute evidence of disparate treatment because of the small numbers of employees involved relative to Delta's employment population, they cannot constitute conclusive proof thereof. See *International Brotherhood of Teamsters* v. *United States*, *supra*, and other cases previously cited herein. Rather, they must be considered along with all of the evidence in deciding this case.

As the court has previously stated, the main thrust of the plaintiff's case was a showing that in numerous specific situations Delta's supervisory personnel dealt more harshly with Negroes, both as to the disciplinary action taken and as to the entries made to the employees' files, than Caucasians. A review of every such incident is not practicable, and the court will not now attempt to do so.

However, one incident involving the plaintiff is sufficiently offensive to this court that individual recognition must be given to it. Based on little more than rumors or gossip, in April of 1972 defendant's then Base Manager, June Kulenkamp, determined to have Rosemary August examined for a venereal disease. Not only was the plaintiff not given any chance to con-

2. In reaching this decision to give weight to this statistical evidence presented by the plaintiff, the court has determined that it must reject plaintiff's argument that the proper measuring period is only 1975, the year she was terminated. In that year, 6 of 8 terminations involved Negroes. Clearly, 1975 cannot stand alone because the sample is too small, the measuring period is too short to be meaningful, and the results obtained are misleading.

front the sources of Kulenkamp's information, she was not even told why she must submit to the medical examination until after the tests proved negative. In the interim, she was left to speculate on the need for this immediate physical examination. While the court believes the embarrassment and anxiety caused Rosemary August in this incident were unnecessary and the result of improper handling of the situation, it cannot find a racial motive therefor in the record. There simply was no showing that any other flight attendant, Negro or Caucasian, was subjected to treatment even remotely similar thereto.

By the remainder of her evidence, the plaintiff presented numerous other incidents where one employee, a Negro, was dealt with severely while in similar situations lesser measures were taken against Caucasian flight attendants. These included showings that Negroes were given "no shows", suspensions, and "discrepency reports" (on the order of a warning notice) where in like cases, Caucasians were dealt with more tolerantly. However, both by its own evidence and during cross-examination, the defendant established that on an equal number of occasions, Delta personnel showed favoritism to Negroes.

For example, the plaintiff established that for infractions such as tardiness, missing Delta training sessions, not being within ready telephonic reach while on reserve duty, substandard work performance, substandard service to passengers, offensive disposition, missing scheduled uniform and weight checks, and for various other infractions, stern measures were taken against Negroes in general and Rosemary August in particular, while a more tolerant attitude was displayed toward Caucasians. Additionally, the plaintiff demonstrated that in certain cases, the benefit of any doubt was shown a Caucasian flight attendant but not a Negro. Finally, certain Caucasian flight attendants who were in jeopardy of losing their jobs were given more warnings and "last chances" than certain Negro attendants.

Standing unrebutted, this evidence would raise the necessary inference of racial bias. However, the evidence establishes that

in equal numbers of cases, it was the Negro that benefited from a benevolent supervisor. Negroes were given discrepancy reports (warnings) instead of "no shows", or were excused from any discipline where in similar situations Caucasians were dealt with severely.

Rosemary August's own employment history includes such incidents. While her file contains four "no shows", it was established that she was properly subject to citation on at least three additional occasions. At other times, she received only verbal reprimands or was excused from any discipline when her conduct could under Delta policy have resulted in the imposition of stronger sanctions.

In reaching its conclusion in this case, the court must note certain discrepencies in the testimony. It is established Delta policy that an applicant disclose any prior employment within the airline industry. Rosemary August had previously been employed by United Airlines, Inc. when she applied for the position of flight attendant with Delta Air Lines. Her employment application fails to disclose this fact. While Miss August testified that she orally disclosed this experience during her job interview but was told "not to worry about it", the interviewer involved, Kendall Allen, denied this. Allen also testified, and it appears reasonable to conclude, that prior airline experience is an important element in evaluating a job applicant. Miss August also testified that in her opinion she had performed her duties as a flight attendant in an acceptable manner and was not adequately apprised of dissatisfaction harbored by her supervisors. However, it was shown that in December of 1974, following a series of events culminating in a two-day suspension, Rosemary August sent letters of apology to both Base Manager Severtsen and her immediate supervisor, Carolyn Powers, in which she acknowledged that she may have been guilty of substandard work performance and would endeavor to correct the situation. As is its duty, the court has taken these factors into account in

determining the weight to be given to the evidence presented by the parties in this lawsuit.

From the evidence presented, it would appear that Delta Air Lines, Inc. may not be the most pleasant place to work. However, this trial record does not establish that its employment practices are racially premised. It further does not support the conclusion Rosemary August was subjected to disparate treatment, either in her employment or termination, because of the fact she is a Negro. For this reason, this court has concluded that it must enter its judgment in this case in favor of the defendant.

Accordingly, this case will be, and the same hereby now is dismissed with prejudice in favor of the defendant Delta Air Lines, Inc. and against the plaintiff Rosemary August. Each party will bear its own costs of litigation. No award of attorney's fees will be made in favor of either party.

This Memorandum of Decision and Order is intended to satisfy the provisions of Rule 52(a) of the Federal Rules of Civil Procedure which require the court to set forth its findings of fact and conclusions of law in all cases tried by the court sitting without a jury.

Dated at Chicago, Illinois, this 9th day of June, 1978.

APPENDIX F.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

ROSEMARY AUGUST, *Plaintiff,*
vs.
DELTA AIR LINES, INC., *Defendant.*
No. 77 C 95

PROOF OF SERVICE OF OFFER OF JUDGMENT

State of Illinois } ss.:
County of Cook }

Max C. Brittain, Jr., being duly sworn, deposes and says:

1. I am attorney for the defendant in this action.

2. On May 12, 1977, Delta Air Lines, Inc., the defendant in this action, served upon plaintiff's attorney the annexed offer of judgment.

Max G. Brittain, Jr.,
One of the Attorneys for
Defendant Delta Air Lines, Inc.

Dated:

Notary Public

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

ROSEMARY AUGUST,
Plaintiff,
vs.
DELTA AIR LINES, INC.,
Defendant.

No. 77 C 95

OFFER OF JUDGMENT

To: Carole K. Bellows
Bellows & Bellows
One IBM Plaza, Suite 1414
Chicago, Illinois 60611

Pursuant to Rule 68 of the Federal Rules of Civil Procedure, defendant hereby offers to allow judgment to be taken against it in this action, in the amount of $450 which shall include attorney's fees, together with costs accrued to date. This offer of judgment is made for the purposes specified in Rule 68, and is not to be construed either as an admission that the defendant is liable in this action, or that the plaintiff has suffered any damage.

Max G. Brittain, Jr.,
One of the Attorneys for
Defendant Delta Air Lines, Inc.

Of Counsel:
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7200 Sears Tower
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876-1000

Sidney F. Davis
Hunter R. Hughes
Delta Air Lines, Inc.
Hartsfield Atlanta International Airport
Atlanta, Georgia 30320

APPENDIX G.

Original Rule 68, eff. September 16, 1938

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. If the offer is not so accepted it shall be deemed withdrawn and evidence thereof is not admissible. If the adverse party fails to obtain a judgment more favorable than that offered, he shall not recover costs in the district court from the time of the offer but shall pay costs from that time.

As amended, eff. March 19, 1948

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

The fact that an offer is made but not accepted does not preclude a subsequent offer.

As amended, eff. July 1, 1966

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.